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No. 99-881

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

LLOYD A. GOOD, JR.,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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1. The first question presented here is a straightforward, and undeniably important, question of constitutional law: Whether a *per se* taking under *Lucas* [1] occurs when a government regulation deprives property of all economic value, even if reasonable, investment-backed expectations —one of the *Penn Central* [2] factors—are not shown. The Federal Circuit squarely held that a property owner must show such expectations to win under *Lucas* and rejected Good's *Lucas* claim on the expectations factor alone, without disputing that his property had been deprived of all

[1] *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[2] *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978).

value. Pet. App. 9a-11a. The Government contends that that holding was correct. Opp. 16.

The Government attempts to deny the conflict between the decision below and the decisions of numerous other federal and state appellate courts (Opp. 18-20), but the conflict is stark and undeniable. *See* Pet. 12-17.[3] Thus, in *Dodd* v. *Hood River County*, 136 F.3d 1219, 1228 (9th Cir.), *cert. denied*, 119 S. Ct. 278 (1998), the Ninth Circuit ruled: "In *Lucas*, the Supreme Court held that there is a categorical taking when a regulation prohibits all economically benefical use of land, and no balancing of other factors commonly analyzed in takings law—reasonable investment backed expectations and legitimate government interest—would be necessary." The Government's assertion that this statement was dicta (Opp. 19) is simply wrong.[4]

As shown in the petition, numerous courts—including no fewer than six state supreme courts—have interpreted *Lucas*, like the Ninth Circuit in *Dodd*, not to require consideration of the expectations factor of the *Penn Central* test where a deprivation of all economic value is shown. *See* Pet. 12-17. The Government tries to chip away at

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[3] The Government does not dispute that a mountain of scholarly work has construed *Lucas* the way we do, *see* Pet. 18-19, nor does the Government cite a single work to the contrary. Rather than deal with the scholarly commentary, the Government ignores it.

[4] In *Dodd* the court faced a question of issue preclusion. The Dodds had litigated, and lost, a takings claim under the Oregon Constitution in state court; they then brought a Fifth Amendment takings claim in federal court. To determine the preclusive effect of the state court adjudication on the Dodds' federal claim, the Ninth Circuit had to identify and compare the elements of an Oregon takings claim and a federal takings claim. The Ninth Circuit held that the Oregon adjudication precluded the Dodds' *Lucas* claim but that, because Oregon does not consider the investment-backed expectations factor, the Dodds' *Penn Central* claim was not precluded. Thus, the Ninth Circuit's articulation of what is and what is not required under *Lucas* was absolutely essential to its decision.

the conflict on grounds that some of the cases we cite are on appeal or were rendered by intermediate state appellate courts or federal district courts. *See* Opp. 19-20 & nn. 18 & 19. But there is no denying that both courts and commentators have held or recognized that a deprivation of all economic value—without more—is a taking under *Lucas*.

Indeed, since the filing of the petition, the D.C. Circuit has joined the many courts that construe *Lucas* the way we do. *See District Intown Properties Ltd. Partnership* v. *District of Columbia*, 198 F.3d 874 (D.C. Cir. Dec. 17, 1999). There, the D.C. Circuit distinguished *Lucas* claims from *Penn Central* claims. The court said that "a 'categorical' or *per se* taking" occurs under *Lucas* when "the government denies *all* economically beneficial or productive use of property," whereas in a *Penn Central* case, a court balances three factors, including "the regulation's interference with the claimant's reasonable, investment-backed expectations." *Id.* at 879 (emphasis in original). Judge Williams, too, in an opinion concurring in the judgment, observed the "distinction between partial and total takings" and "the two modes of analysis" under *Penn Central* and *Lucas*. *Id.* at 886. And he underscored the importance of the distinction when he wrote that since "[f]ew regulations will flunk th[e] nearly vacuous [partial takings] test," *Lucas* is a property owner's only real hope of obtaining just compensation for a regulatory taking. *Id.*[5]

On the merits of the issue, the Government and the Federal Circuit simply cannot be right that *Lucas* requires a

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[5] In *Ali* v. *City of Los Angeles*, 91 Cal. Rptr. 2d 458, 463 (Cal. Ct. App. Dec. 28, 1999), *review filed* (Cal. Feb. 4, 2000), which was also decided after the petition was filed, the court held that the City's "denial of [a] demolition permit deprived Ali of all economically viable use of his land" and thus was a taking under *Lucas* without any consideration of whether Ali had investment-backed expectations.

showing of reasonable, investment-backed expectations in addition to a deprivation of all economic value. This Court in *Lucas* repeatedly stressed that it was applying a categorical or *per se* rule. *See* 505 U.S. at 1015, 1019 n.8, 1026. But if the economic impact of the regulation *and* the property owner's expectations must be considered, there is literally no difference between *Lucas* and the *Penn Central* test.[6] Furthermore, *Lucas* itself said that when government deprives property of "all economically beneficial use, we think it may resist compensation *only* if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027 (emphasis added). The Government tries to fit this case within the exception recognized in *Lucas*, claiming that Good's development would violate "pre-existing limitation[s]" on his title. Opp. 17-18. But the regulation that proscribed Good's development—the Endangered Species Act ("ESA")—was *not* pre-existing; it was enacted *after* Good purchased the property.[7]

The Government has no response at all to our showing, *see* Pet. 11, that a physical invasion—another kind of categorical taking—"is a taking without regard to other factors that a court might ordinarily examine," *Loretto*,

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[6] The third and final *Penn Central* factor—the character of the government action—only counsels finding a taking when the action is a physical invasion of property. *See Penn Central*, 438 U.S. at 124; *District Intown*, 198 F.3d at 883. But actions of that character are themselves categorical takings. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

[7] Unlike the situation with respect to the hypothetical nuclear power plant on an earthquake fault (Opp. 17), the two species on Good's property were not legally protected, or even determined to be endangered, until after Good bought the land. Thus, unlike the rule against building on a fault line, interference with these species was not "*always* unlawful." *Lucas*, 505 U.S. at 1030 (emphasis in original). Instead, the ESA was "newly legislated." *Id.* at 1029.

458 U.S. at 432, such as the expectations factor. If physical invasion cases do not require consideration of expectations, neither should total takings cases. *See Lucas*, 505 U.S. at 1029 (the two types of categorical takings should receive "similar treatment").

Finally, the Government's citation of Justice Kennedy's opinion concurring in the judgment in *Lucas* (Opp. 16 n.17)— far from supporting its reading of *Lucas*—only highlights the difference between the majority opinion and Justice Kennedy's lone concurrence.[8] The Government's reliance on *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) (Opp. 15 n.16), is also misplaced because in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), this Court held that the odd facts of *Monsanto* had no bearing on cases involving "the right to build on one's property." *Id.* at 833 n.2.

2. The second question presented concerns the Federal Circuit's holding that Good lacked reasonable investment-backed expectations. The Government's defense of that holding is startling. The Government contends that Good lacked a reasonable belief that he could develop his property because "long before petitioner and his mother purchased the subject property in 1973," Opp. 11, the Rivers and Harbors Act of 1899 ("RHA") and the Clean Water Act ("CWA") required him to obtain a federal permit, and his land was subject to the government's "navigational servitude." Opp. 2-5, 11-15.

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[8] *See The Supreme Court, 1991 Term—Leading Cases*, 106 Harv. L. Rev. 163, 273 (1992) (Justice Kennedy "agreed with [the Court] that a regulation that rendered property valueless requires compensation, but he added that this finding must be evaluated 'by reference to the owner's reasonable, investment-backed expectations.'"); David L. Callies, *Regulatory Takings and the Supreme Court*, 28 Stetson L. Rev. 523, 557 (1999) (criticizing a state court for "misread[ing] the Kennedy concurrence to be a part of the opinion and engraft[ing] the 'reasonable, investment-backed expectations' standard onto the per se rule").

What astonishes about this proposition is that the denial of Good's permit request was not based on the RHA, the CWA, or the servitude. Indeed, despite all these requirements, the Army Corps of Engineers issued Good no fewer than *three* permits in the 1980s. *See* Pet. App. 3a, 5a; Opp. 5 & n.8 The issuance of these three permits demonstrates that Good's expectations were not just reasonable—they were actually borne out.[9]

Good was ultimately denied federal permission to develop his property because in 1990 and 1991 the marsh rabbit and the silver rice rat were placed on the endangered species list. Thus, the government regulation against which Good's expectations must be measured is the Endangered Species Act, not the RHA, the CWA, or the navigational servitude. And Good could not possibly have known that the ESA would frustrate his plans because he purchased his property months *before* the ESA was enacted and some *17 years* before the two species were listed as endangered. *See Florida Rock Indus., Inc.* v. *United States,* 45 Fed. Cl. 21, 39-40 (1999) (property owner's expectations were reasonable since the CWA was enacted after purchase of the land). The Government claims that "each of the federal permit requirements relevant to this case was already in effect," Opp. 2, but the relevant fact is that the ESA was not.[10] This is not a case in which a property owner

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[9] There can be no argument that Good's takings claim fails simply because of the RHA permit requirement and the navigational servitude. *See United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) ("the very existence of a permit system implies that permision may be granted, leaving the landowner free to use the property as desired"); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 172 (1979) ("this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause"); Pet. App. 48a (rejecting argument that the servitude defeats Good's takings claim).

[10] The Government misleadingly reformulates the second question presented to suggest that Good's permit was denied under the

is complaining about restrictions already in effect when he purchased his land. Indeed, the Government later concedes that the enactment of the ESA "changed the governing legal regime." Opp. 13.

At bottom, then, the Government's theory is that there was no taking in this case because Good's land at the time of purchase was already regulated by statutes and doctrines *other than* the ESA—the law that actually barred his development. The implications of this theory for property rights and property owners are far-reaching indeed. Under the Government's theory, there can be no reasonable, investment-backed expectations where the property in question is subject to regulation (which applies to virtually all property), because the property may thereafter be burdened by additional regulation. As Judge Williams has written, "except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation." *District Intown*, 198 F.3d at 887 (opinion concurring in the judgment). Not much remains of the Takings Clause under this theory.

The Government does not dispute that the decision below conflicts with the cases discussed on page 24 of the petition, in which it was held that property owners had reasonable expectations despite having purchased after the regulation. And the decision below also conflicts with *Lopes* v. *City of Peabody*, 629 N.E.2d 1312 (Mass. 1994), which involved an ordinance barring any new building projects within a designated "wetlands conservancy district." Lopes acquired land within such a district

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RHA and CWA. Opp. i. There is no question, however, that the permit was denied "pursuant to the Endangered Species Act." Pet. App. 16a.

six years *after* the ordinance was enacted, but the Supreme Judicial Court said that fact was irrelevant:

> A rule that purchasers of real estate take subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. [*Id.* at 1315.]

Notably, the Federal Circuit's opinion in this case has already been cited twice in support of holdings that property owners lacked reasonable, investment-backed expectations. *See District Intown*, 198 F.3d at 884; *Palazzolo* v. *State of Rhode Island*, —— A.2d ——, 2000 WL 225574, at *9 (R.I. Feb. 25, 2000). The fact that other courts have followed the Federal Circuit's opinion only confirms the Justice Department's initial assessment, made in a press release announcing its victory below, that this is a "significant" and "precedent-setting" case. Pet. 2, 26. There is true confusion in this area of law, and unless this Court corrects the Federal Circuit's erroneous analysis, the opinion of the court below will surely have a pernicious influence on the decisions of other courts.

3. The Government contends that this case is "an inappropriate vehicle" for resolving the first question presented because, it argues, Good's property was not deprived of all value. Opp. 20.[11] This is pure obfuscation.

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[11] It is important to note that the Government is *not* arguing that the judgment below can be defended on the alternative ground that Good's property was not, as a factual matter, deprived of all value. Because the trial court granted summary judgment in the Government's favor on this issue, the judgment below could now be upheld on that ground only if Good failed to generate a genuine issue of material fact on the issue. *See* Fed. R. Civ. P. 56(c). The Government does not contend that it could make such a showing to this Court. Furthermore, it is fair to assume that if the Fed-

The Federal Circuit did not dispute that Good suffered a total loss; the court assumed he did and ruled on the basis of the expectations factor alone. Pet. App. 9a. Thus, a perfectly clean legal issue is presented.

In any event, the facts are contrary to the Government's contention. In 1973, Good and his mother paid $2 million for a group of properties that included the 40 acres at issue here. Pet. App. 20a. Good acquired his mother's 30% interest in the properties when she died in 1975, and at that time the 40 acres were appraised for federal inheritance tax purposes as having a fair market value of $153,717. C.A. App. 389.[12] Good subsequently invested some $95,000 in the property. Pet. App. 20a n.3.

The reasonable and prudent alternatives ("RPAs") initially suggested by the Fish and Wildlife Service ("FWS") in 1991 would have restricted development to the eight acres of uplands, and Good submitted unrebutted evidence that the cost of developing the uplands by themselves would exceed the revenue to be generated from such development, because lots lacking water access would not be marketable. C.A. App. 628-636. FWS revised its RPAs in 1995, but this was only *after* Good had filed suit in 1994 alleging a taking of his property.[13]

The contention of the Government's appraiser, Slack, that the property had transferable development rights ("TDRs") worth $112,000 wholly ignored the fact that

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eral Circuit could have affirmed the trial court's grant of summary judgment on this issue, it would have done so.

[12] Good offered evidence that his basis in the property was $92,718.78 (C.A. App. 211, 256), and the Court of Federal Claims accepted that figure. Pet. App. 20a.

[13] The reasons why Good declined to participate in the revision of the RPAs in 1995, a process instituted *after* he filed suit, have been fully explained previously. *See* Good's C.A. Br. 21-26. This issue was not relevant to the Federal Circuit's decision, and the court did not address it.

the property was not zoned for the sale of TDRs (C.A. App. 399), and improperly assumed that TDRs can constitute just compensation. *See Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725, 747-749 (1997) (Scalia, J., joined by O'Connor & Thomas, JJ., concurring in the judgment). Furthermore, $112,000 would hardly be just compensation in this case; Slack himself testified that, with the permit Good seeks, the land would be worth $1.2 million. C.A. App. 394. Good's own appraiser valued the property at $1.54 million with the permit. C.A App. 636.[14]

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For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[14] The Government suggests that this valuation requires a finding that Good would have been able to obtain the necessary state and local permits (Opp. 21), but the Court of Federal Claims fully considered and rejected that very argument. Pet. App. 62a-68a. In any event, Good clearly was capable of obtaining such permits, since he did. By mid-1984, "Good had received federal, state, and county approval to develop the property." Pet. App. 3a.